

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VERIFONE, INC., a Delaware corporation,)
)
Plaintiff,)
vs.)
)
A CAB, LLC, a Nevada limited liability)
company,)
)
Defendant.)

Case No.: 2:15-cv-00157-GMN-GWF

ORDER

A CAB, LLC, a Nevada limited liability)
company,)
)
Counterclaim Plaintiff,)
vs.)
)
VERIFONE, INC., a Delaware corporation,)
)
Counterclaim Defendant.)

Pending before the Court is a Motion to Dismiss Defendant's Amended Counterclaim (ECF No. 16) filed by Plaintiff VeriFone, Inc. ("VeriFone"). Defendant A Cab, LLC ("A Cab") filed a Response (ECF No. 22), and VeriFone filed a Reply (ECF No. 23).

I. BACKGROUND

A Cab alleges in its Counterclaim that it entered into a Dispatch Service Lease Agreement ("the Contract") with VeriFone on November 11, 2011, wherein VeriFone agreed to provide A Cab with a dispatch system and the parties agreed to limit the damages available to them. (Answer and Am. CounterCl. ¶¶ 11, 31, ECF No. 15; Dispatch System Lease Agreement, Ex. 2 to Mot. to Dismiss Am. Countercl. ¶ 11, ECF No. 17). A Cab claims the equipment and

1 software VeriFone provided in accordance with the Contract “failed to work as promised,” and
2 VeriFone was “unable or unwilling to resolve the issues.” (Answer and Am. Countercl. ¶ 2,
3 ECF No. 15). A Cab claims that it communicated with VeriFone at various points to discuss
4 why the dispatch system was down and the state of their Contract, which culminated in A Cab
5 informing VeriFone that the Contract was “voided based upon nonperformance by VeriFone”
6 in January of 2014. (*Id.* at ¶¶ 11–24). VeriFone subsequently filed the present suit against A
7 Cab (Compl., ECF No. 1), and A Cab filed a Counterclaim (ECF No. 7), which it later amended
8 alleging VeriFone breached their contract and its implied covenant of good faith and fair
9 dealing (Answer and Am. Countercl., ECF No. 15).

10 **II. LEGAL STANDARD**

11 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
12 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
13 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
14 which it rests, and although a court must take all factual allegations as true, legal conclusions
15 couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
16 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
17 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
18 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
19 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
20 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
21 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
22 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

23 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
24 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
25 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in

1 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
2 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
3 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
4 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

5 **III. DISCUSSION**

6 A Cab alleges VeriFone breached their contract and its implied covenant because it
7 failed to “perform and provide an operable dispatch system[.]” (Answer and Am. Countercl. ¶¶
8 26–28, 33, 39, ECF No. 15). A Cab claims that its damages for such breach include “loss of
9 revenue from loss of use of its cabs; loss of business without an operable dispatch system; loss
10 of revenue from inability to process credit card payments; hours spent in lost manpower;
11 additional manpower necessitated without the dispatch system; unnecessary mileage and fuel
12 expenditures; and permanent damage with its customers in amounts to be proven at trial.” (*Id.*
13 at ¶ 25, ECF No. 15). VeriFone moves to dismiss A Cab’s claim for consequential damages
14 because it claims those damages are precluded by their Contract. (Mot. to Dismiss 8:15–20,
15 ECF No. 16).

16 As a preliminary matter, the Court notes that state law controls both contract
17 construction and breaches, and the parties may agree upon which state’s laws to apply through
18 a clause in the contract. *See In re Qintex Entm’t, Inc.*, 950 F.2d 1492, 1494, 1497 (9th Cir.
19 1991). The Contract specifies that it will be “construed in accordance with the law of the State
20 of Nevada[.]” (Dispatch System Lease Agreement, Ex. 2 to Mot. to Dismiss Am. Countercl. ¶
21 13(d), ECF No. 17). Therefore, the Court will apply Nevada’s state law.

22 A party may claim consequential damages if the damages were foreseeable. *See Barnes*
23 *v. W.U. Tel. Co.*, 27 Nev. 438 (1904). In order to be foreseeable, the damages must arise
24 naturally from the breach of the contract, and the damages must be the probable result of a
25 breach reasonably supposed to be in the contemplation of both parties when they made the

1 contract. *Clark Cnty. Sch. Dist. v. Rolling Plains Const., Inc.*, 117 Nev. 101, 106 (2001) (citing
2 *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (1854)) (disapproved of on other grounds in
3 *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948 (2001)). Under
4 Nevada law, “[c]onsequential damages may be limited or excluded unless the limitation or
5 exclusion is unconscionable.” Nev. Rev. Stat. § 104.2719. As a general rule, “when a contract
6 is clear on its face, it will be construed from the written language and enforced as written.”
7 *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. Adv. Op. 1 (2015) (internal quotations and
8 citations omitted). A contract will only be considered unconscionable when the contract’s
9 clauses and circumstances “are so one-sided as to oppress or unfairly surprise an innocent
10 party” at the time of its execution. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev.
11 414, 418 (1973).

12 Here, the damages A Cab requests are consequential damages. If VeriFone were to
13 breach the Contract with A Cab and not provide an operable dispatch system, it would be a
14 natural result and reasonable to suppose that both parties knew A Cab would lose revenue and
15 incur additional costs (including lost revenue due to the inability to process credit cards
16 payments, the lost revenue because of the lost use of cabs and VeriFone’s dispatch system, and
17 additional mileage and fuel expenditures) and need to use a replacement system (including
18 additional manpower hours to act as the dispatch system). Furthermore, knowing that A Cab is
19 a taxi operator, VeriFone also had reason to know that if it provided dispatch equipment that
20 did not operate correctly and interfered with customer service, A Cab could be blamed and
21 could lose the goodwill and future business of its customers. (Dispatch System Lease
22 Agreement, Ex. 2 to Mot. to Dismiss Am. Countercl. at 3, ECF No. 17) (showing both parties
23 acknowledged A Cab as a taxi operator). Thus, the Court finds that all of the damages
24 requested are consequential damages. Accordingly, the Court will now analyze the Contract to
25 determine if the Contract allows for the recovery of consequential damages.

1 The Contract provides as follows:

2 **Limitations of Liability:** Except for a breach of the obligations
3 under Sections 8 and 10, neither party shall be liable to the other
4 party or its officers, directors, employees, agents, and affiliates for
5 any indirect, special, punitive, exemplary, incidental or
6 consequential damages. The foregoing limitation of liability shall
7 apply to any claim or cause of action under law or equity
8 whatsoever, including contract, warranty, strict liability, or
9 negligence, even if a party has been notified of the possibility of
10 such damages or claim.

11 (Dispatch System Lease Agreement, Ex. 2 to Mot. to Dismiss Am. Countercl. ¶ 11, ECF No.
12 17) (emphasis in original). Because Sections 8 and 10 of the Contract are not at issue here, the
13 Court finds that the Contract unambiguously states that A Cab may not seek consequential
14 damages against VeriFone for any of the claims at issue here. Moreover, the limitation on
15 liability was described in its own paragraph entitled “**Limitations of Liability**” and thus,
16 cannot be said to unfairly surprise A Cab. Furthermore, the limitation on consequential
17 damages applied equally to both parties and thus is not oppressively one-sided. Therefore, the
18 Court finds that the clause is not unconscionable.

19 As a result, the Contract unambiguously bars A Cab from seeking consequential
20 damages from VeriFone, and A Cab has not sought any other relief for its claims. Therefore,
21 under 12(b)(6), A Cab has failed to “state a claim *upon which relief can be granted*” because it
22 has not shown or identified any relief that it could be entitled to receive under the Contract.
23 Fed. Rule Civ. P. 12(b)(6) (emphasis added). Accordingly, A Cab’s claims for breach of
24 contract and breach of implied covenant of good faith and fair dealing are dismissed.

25 **B. Leave to Amend**

Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give
leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]
held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should
grant leave to amend even if no request to amend the pleading was made, unless it determines

1 that the pleading could not possibly be cured by the allegation of other facts.’’ *Lopez v. Smith*,
2 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
3 1995)).

4 The Court finds that A Cab may be able to plead additional facts to support its claims
5 against VeriFone. Accordingly, because the Court finds that A Cab may be able to plead
6 additional facts to support its claims, the Court will grant A Cab leave to file a second amended
7 counterclaim solely for this purpose. Plaintiffs shall file a second amended counterclaim within
8 fourteen (14) days of the date of this Order if it can allege sufficient facts that plausibly
9 establish that it is entitled to relief not barred by the Contract.

10 **IV. CONCLUSION**

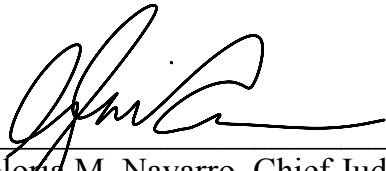
11 **IT IS HEREBY ORDERED** that VeriFone’s Motion to Dismiss (ECF No. 16) is
12 **GRANTED.**

13 **IT IS FURTHER ORDERED** that the Amended Counterclaim (ECF No. 15) is
14 **DISMISSED WITHOUT PREJUDICE.**

15 **IT IS FURTHER ORDERED** that A Cab shall file its second amended counterclaim
16 by **November 6, 2015**. Failure to file a second amended counterclaim by this date shall result
17 in the Court dismissing A Cab’s Amended Counterclaim with prejudice.

18 **DATED** this 23rd day of October, 2015.

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Gloria M. Navarro, Chief Judge
United States District Judge